

Concise Explanatory Statement (RCW 34.05.325(6))
Professional Employer Organization (PEO) Rules

Prepared by Art Wang, Special Assistant for Unemployment Taxes
Nov. 20, 2007

Reasons for Rules: These rules generally implement the Professional Employer Organization (PEO) provisions of ESSB 5373 (C146, L07, sec. 8-17). For more details, see Written Testimony of Employment Security Department at the public hearing on Nov. 8, 2007, available in the rules file.

Differences from Proposed Rules Published in CR-102: Minor editing changes.

Comments Received on Proposed Rules Published in CR-102: Testimony by PEOs did not include substantive comments on proposed rules published in CR-102. See Written Testimony (cited above) for documentation of involvement by stakeholders prior to this.

Comments Received Prior to Proposed Rules:

Representatives of PEOs recommended:

- Use a transparent process and develop forms promptly for the September 2007 registration deadline.
- Establish guidance by Nov. 1, 2007, on how to comply and do not push deadlines beyond Jan. 1, 2008.
- All communications should go through PEO (with proper authorization).
- Allow PEOs to fix problems before contacting client employers.
- Recognize some employers use PEOs for just part of their labor force.
- Prefer simple rules to implement.
- Use department form or generic power-of-attorney form, but do not require notarization or Social Security number on form.
- Make forms available electronically.
- Allow PEOs to represent client employers with 30 days grace to provide authorization documentation.
- ESD should respond to power-of-attorney within 24 hours or it is presumptively effective.
- Allow filing a single electronic report with a single check for quarterly payments.
- Use either a new employer rate or the PEO rate for client employers; do not use a "look-back" prior to 2008 to set future rates.
- Address issues of charging to base-year employer.
- Do not distinguish for rate purposes client employers who join a PEO after July 1, 2007.
- Do not require PEOs to provide physical locations in Washington to review payroll records; accept electronic records; allow audits to be conducted at ESD facilities.
- Treat PEOs the same as other employers for purposes of producing business records in audits.

- Assign errors to PEOs (even if out-of-state) before assigning to client employers.
- Do not impose retrospective revisions to lawful experience for existing PEO clients.
- Need due process for revocation of PEO.
- Amount for bonds should be guidelines, not requirement; use highest quarter of prior year.
- Treat client employers as part of a PEO through Dec. 31, 2007.

Representatives of business organizations recommended:

- Give client employers the PEO rate for the first year, not a new employer rate.
- Treat client employers as successor employers for rate purposes.
- Make bond high enough to cover liabilities.
- Ensure that costs are not socialized.

Representatives of labor organizations recommended:

- Maintain intent of legislation so that rules do not subvert historic legislation by trying to accommodate current PEO business models.
- No time extensions beyond Jan. 1, 2008.
- Client employers are ultimately liable and should receive significant information.
- Client employers should not get the PEO rate in 2008 if ESD has any information on the client employer's own experience.
- Do not allow client employers to avoid delinquent rate or dump their adverse experience by joining a PEO after July 1, 2007.

Results:

Almost all comments are reflected in the rules. Major issues in comments that were not adopted were:

- Allowing PEO representation of a client employer before documentation of authorization and requiring ESD response to a power-of-attorney within 24 hours.

ESD made authorization relatively easy, e.g., allowing fax transmission and no requirement for notarization, so it did not appear necessary or appropriate under federal and state confidentiality requirements to allow representation prior to authorization. PEOs may proceed with representation when they submit a power-of-attorney and ESD has begun a process of acknowledging receipt of the document, so it appeared unnecessary to require immediate ESD response to the power-of-attorney.

- Allowing client employers who join a PEO after July 1, 2007, to still qualify for the PEO's rate as of Jan. 1, 2008.

Rates for all employers for 2008 are set based on experience prior to the July 1 "computation date." Thus, all data to set 2008 rates were already determined as of July 1, prior to the date the small number of client employers affected would have joined the PEO, and after the date ESSB 5373 was signed into law. For this small group, rates for

2008 will be based entirely on the employer's experience without need to apply the PEO's pooled experience. It would be inconsistent with the philosophy of ESSB 5373 to allow an employer to fail to pay its taxes, be assigned a maximum tax rate because of its delinquency, join a PEO on December 31, and receive a lower rate on January 1.

- Not allowing client employers to get the PEO rate for 2008 if ESD has any information about the client employer's prior experience.

This would create inequities which would be difficult to justify under ESSB 5373. It would create a situation in which some employers, although they had legally joined a PEO in prior years, would be penalized in the form of higher 2008 rates, contrary to their reasonable expectations and the assurances the department provided at the time ESSB 5373 passed. Employers who reasonably relied on the law as it existed at that time should not be penalized. Assigning rates for 2008 under this method would also have created an arbitrary mix of some individual prior experience combined with the pooled PEO experience. This mixture would vary for each employer depending upon the quarter in which it joined the PEO.